

1 “[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some
2 particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
3 (quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the
4 benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

5 An inmate submitting an application to proceed IFP must also “submit a certificate from
6 the institution certifying the amount of funds currently held in the applicant’s trust account at the
7 institution and the net deposits in the applicant’s account for the six months prior to the date of
8 submission of the application.” LSR 1-2; *see also* 28 U.S.C. § 1915(a)(2). If the inmate has been
9 at the institution for less than six months, “the certificate must show the account’s activity for
10 this shortened period.” LSR 1-2.

11 If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount
12 of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an
13 initial partial filing fee that is calculated as 20 percent of the greater of the average monthly
14 deposits or the average monthly balance for the six-month period immediately preceding the
15 filing of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid,
16 the prisoner is required to make monthly payments equal to 20 percent of the preceding month’s
17 income credited to the prisoner’s account. 28 U.S.C. § 1915(b)(2). The agency that has custody
18 of the prisoner will forward payments from the prisoner’s account to the court clerk each time
19 the account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

20 Plaintiff’s certified account statement indicates that his average monthly balance for the
21 last six months was \$.19, and his average monthly deposits were \$4.98.

22 Plaintiff’s application to proceed IFP should be granted. Given that Plaintiff currently has
23 a \$0 account balance, Plaintiff should not be required to pay the initial partial filing fee;

1 however, whenever his prison account exceeds \$10, he must make monthly payments in the
 2 amount of 20 percent of the preceding month's income credited to his account until the \$350
 3 filing fee is paid.

4 II. SCREENING

5 **A. Standard**

6 Under the statute governing IFP proceedings, "the court shall dismiss the case at any time
 7 if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal--
 8 (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii)
 9 seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.
 10 § 1915(e)(2)(A), (B)(i)-(iii).

11 In addition, under 28 U.S.C. § 1915A, "[t]he court shall review, before docketing, if
 12 feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in
 13 which a prisoner seeks redress from a governmental entity or officer or employee of a
 14 governmental entity." 28 U.S.C. § 1915A(a). In conducting this review, the court "shall identify
 15 cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--
 16 (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks
 17 monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b)(1)-(2).

18 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
 19 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and
 20 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a
 21 complaint under these statutes, the court applies the same standard as is applied under Rule
 22 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule
 23

1 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232
2 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

3 The court must accept as true the allegations, construe the pleadings in the light most
4 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*,
5 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less
6 stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9
7 (1980) (internal quotation marks and citation omitted).

8 A complaint must contain more than a "formulaic recitation of the elements of a cause of
9 action," it must contain factual allegations sufficient to "raise a right to relief above the
10 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading
11 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]
12 a legally cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a
13 plaintiff should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at
14 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

15 A dismissal should not be without leave to amend unless it is clear from the face of the
16 complaint that the action is frivolous and could not be amended to state a federal claim, or the
17 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
18 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

19 **B. Plaintiff's Complaint**

20 Plaintiff's complaint names Judge James C. Mahan, Debra K. Kemp (presumably
21 referring to District of Nevada Clerk of Court Debra Kemp), and ex-forensic technician Linda
22 Errichetto as defendants.

1 **1. Judge Mahan and Debra Kempf**

2 Plaintiff alleges that on January 22, 2019, Magistrate Judge Cam Ferenbach ordered
3 Plaintiff to file an objection to a report and recommendation by February 5, 2019. On February
4 4, 2019, Plaintiff filed his objection. On February 5, 2019, Judge Mahan told the Clerk to enter
5 and sign the judgment in favor of Linda Errichetto, Steve Wolfson, and against Plaintiff, because
6 he did not respond to the report and recommendation. He asserts that this is fraud under Federal
7 Rule of Civil Procedure 60. He further alleges that Debra Kempf committed fraud when she
8 entered and signed the judgment when only a judge or magistrate has the authority to do so. He
9 asserts that there was a conspiracy between Judge Mahan and Ms. Kempf to deprive him of his
10 rights.

11 The court takes judicial notice of the docket in the case Plaintiff is referring to, 2:16-cv-
12 00287-JCM-VCF. In that case, Plaintiff alleged, as he does in this case, that Linda Errichetto was
13 head of the forensic laboratory in Las Vegas, and she testified at Plaintiff's trial that Plaintiff
14 could not be excluded as a possible source of semen on a swab. Plaintiff was convicted of sexual
15 assault and burglary and sentenced to life without in prison. He alleged that Steve Wolfson
16 blocked his access to biological materials so that a DNA test could be performed to tell whether
17 Plaintiff was innocent. (2:16-cv-00287-JCM-VCF, No. 10.)

18 On January 22, 2019, Magistrate Judge Ferenbach issued a report and recommendation
19 that Plaintiff's first amended complaint be dismissed with prejudice. Plaintiff was advised that he
20 had 14 days to file an objection to the report and recommendation, making the objection due by
21 February 5, 2019. (2:16-cv-00287-JCM-VCF, ECF No. 12.) Plaintiff filed an objection to the
22 report and recommendation on February 4, 2019. (2:16-cv-00287-JCM-VCF, ECF No. 13.)
23

1 On March 4, 2019, Judge Mahan entered an order which stated that Plaintiff did not
2 object to the report and recommendation, and apparently overlooked the objection filed on
3 February 4, 2019. In any event, the court went on to engage in a *de novo* review of the
4 recommendation, and concluded that Plaintiff failed to allege a plausible civil rights claim.
5 Therefore, Judge Mahan adopted and accepted Magistrate Judge Ferenbach's report and
6 recommendation and ordered the case to be dismissed with prejudice and for the clerk to close
7 the case accordingly. (2:16-cv-00287-JCM-VCF, ECF No. 14.)

8 On March 5, 2019, the Clerk entered judgment pursuant to Judge Mahan's decision, and
9 the case was dismissed with prejudice. (2:16-cv-00287-JCM-VCF, ECF No. 15.)

10 Plaintiff then filed a motion for reconsideration of Judge Mahan's order on the report and
11 recommendation. (2:16-cv-00287-JCM-VCF, ECF No. 16.)

12 He filed a notice of appeal of the order on July 30, 2019. (2:16-cv-00287-JCM-VCF,
13 ECF No. 18.) The Ninth Circuit stayed proceedings pending Judge Mahan ruling on the motion
14 for reconsideration. (2:16-cv-00287-JCM-VCF, ECF No. 22.) On October 10, 2019, Judge
15 Mahan denied the motion for reconsideration. (2:16-cv-00287-JCM-VCF, ECF No. 23.) The
16 order acknowledged that Plaintiff had timely filed an objection to the report and
17 recommendation, and still concluded Plaintiff did not set forth a basis for reconsideration of the
18 order. (*Id.*) The Ninth Circuit dismissed the appeal as frivolous. (2:16-cv-00287-JCM-VCF, ECF
19 No. 28.)

20 Judges are entitled to absolute judicial immunity for acts performed in their official
21 capacity, as Plaintiffs have alleged here. *See In re Castillo*, 297 F.3d 940, 947 (9th Cir. 2002)
22 (judicial immunity is “a ‘sweeping form of immunity’ for acts performed by judges that relate to
23 the ‘judicial process.’” “This absolute immunity insulates judges from charges of erroneous acts

1 or irregular action, even when it is alleged that such action was driven by malicious or corrupt
2 motives, ... or when the exercise of judicial authority is 'flawed by the commission of grave
3 procedural errors.'") (citations omitted); *see also Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th
4 Cir. 1986) (en banc); *Moore v. Brewster*, 96 F.3d 1240, 1243 (9th Cir. 1996) ("The judicial or
5 quasi-judicial immunity available to federal officers is not limited to immunity from damages,
6 but extends to actions for declaratory, injunctive and other equitable relief.'").

7 Plaintiff's allegations as to Judge Mahan center around Judge Mahan's adoption of Judge
8 Ferenbach's report and recommendation which overlooked that he had filed an objection. Apart
9 from the fact that Judge Mahan still engaged in a *de novo* review of the report and
10 recommendation, and that he acknowledged the objection and denied Plaintiff's motion for
11 reconsideration, Judge Mahan is entitled to absolute judicial immunity and should be dismissed
12 from this action.

13 Plaintiff alleges that Ms. Kempf improperly entered judgment against him when only a
14 judge or magistrate judge has that authority. Federal Rule of Civil Procedure 58(b)(1) provides:
15 Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the
16 court's direction, promptly prepare, sign and enter the judgment when: ...(C) the court denies all
17 relief." Fed. R. Civ. P. 58(b)(1). Local Rule 77-1(b) further provides that "[t]he clerk must (1)
18 Enter judgments on verdicts or decisions of the court in circumstances authorized by Fed. R. Civ.
19 P. 58(b)(1)." LR 77-1(b)(1). Therefore, Ms. Kempf was authorized to enter judgment against
20 Plaintiff after Judge Mahan entered the order dismissing Plaintiff's action with prejudice.

21 Moreover, clerks have absolute quasi-judicial immunity from damages for civil rights
22 violations when they perform tasks that are an integral part of the judicial process. *See Mullis v.*
23 *United States Bankruptcy Court*, 828 F.2d 1385, 1390 (9th Cir. 1987); *Morrison v. Jones*, 607

1 F.2d 1269, 1273 (9th Cir. 1979). Plaintiff seeks only damages against Ms. Kemp. (ECF No. 1-1
2 at 9.) Therefore, she should be dismissed from this action with prejudice as she is entitled to
3 absolute quasi-judicial immunity in performing the act of entering judgment against Plaintiff.

4 **2. Ms. Errichetto**

5 Plaintiff brings Fourteenth Amendment procedural and substantive due process claims
6 against Linda Errichetto under section 1983. He alleges that she testified at his trial in 1990 that
7 Plaintiff could not be excluded as a possible source of semen on the swab. He then avers that she
8 told his attorney in 2000 that she never tested the semen to exclude Plaintiff. He then states that
9 this is fraud under Rule 60.

10 It appears Plaintiff is alleging that Ms. Errichetto testified falsely at his trial. To the
11 extent he is asserting a fabricated evidence claim against Ms. Errichetto under section 1983, such
12 a claim does not accrue until the criminal proceedings against Plaintiff have terminated in his
13 favor. *McDonough v. Smith*, 139 S.Ct. 2149, 2155 (2019). Therefore, this claim should be
14 dismissed without prejudice so that Plaintiff can raise it if and when his criminal proceedings
15 terminate in his favor.

16 **III. RECOMMENDATION**

17 IT IS HEREBY RECOMMENDED that the District Judge enter an order:

18 (1) **GRANTING** Plaintiff's IFP application (ECF No. 1); Plaintiff should not be required
19 to pay the initial partial filing fee; however, whenever his prison account exceeds \$10, he
20 is required to make monthly payments in the amount of 20 percent of the preceding
21 month's income credited to his account until the full \$350 filing fee is paid. This is
22 required even if the action is dismissed, or is otherwise unsuccessful. The Clerk should be
23 directed to **SEND** a copy of an order adopting and accepting this Report and

1 Recommendation to the attention of **Chief of Inmate Services for the Nevada**
2 **Department of Corrections**, P.O. Box 7011, Carson City, Nevada 89702.

3 (2) The complaint (ECF No. 1-1) should be **FILED**.


4 (3) The action should be **DISMISSED WITH PREJUDICE** as to Judge Mahan and
5 Debra Kempf (erroneously named by Plaintiff as Debra Kemp); and **WITHOUT**
6 **PREJUDICE** as to Ms. Errichetto, but the action should be administratively closed.

7 The Plaintiff should be aware of the following:

8 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
9 this Report and Recommendation within fourteen days of being served with a copy of the Report
10 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s
11 Report and Recommendation” and should be accompanied by points and authorities for
12 consideration by the district judge.

13 2. That this Report and Recommendation is not an appealable order and that any notice of
14 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
15 until entry of judgment by the district court.

16
17 Dated: August 19, 2020

18 
19 _____
20 William G. Cobb
21 United States Magistrate Judge
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